

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PHILIP E. AVERY)	
Claimant)	
VS.)	
)	Docket No. 227,137
LSI CORPORATION)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Both claimant and respondent appeal from the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes dated October 16, 1997, wherein the Administrative Law Judge granted claimant medical treatment and temporary total disability compensation and ordered respondent to provide a list of three doctors for claimant's choice as treating physicians. In so ordering, the Administrative Law Judge found that claimant's injury more probably than not arose out of and in the course of his employment with respondent.

ISSUES

Claimant raises the following issues for consideration by the Appeals Board:

"1. Claimant should have been allowed to select Dr. Fluter as authorized treating physician, and Respondent should not have been allowed to select three physicians due to Respondent's failure to provide medical treatment to Claimant;

"2. Dr. Fluter's medical bill of \$450.00 should have been paid by Respondent as authorized medical care;

“3. All medical bills, including the bills of Dr. Zollinger and Via Christi Medical Center, should be paid by Respondent as authorized medical expenses.”

Respondent raises the following issue for consideration by the Appeals Board:

- (1) Whether claimant suffered accidental injury arising out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidence, the Appeals Board makes the following findings for preliminary hearing purposes:

Appeals from preliminary hearing orders are controlled by K.S.A. 44-534a, as amended. Such appeals are limited to certain jurisdictional issues of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice was given or claim timely made, or whether certain defenses apply. These issues are jurisdictional and subject to review by the Appeals Board. Consideration may also be given on appeal if it is alleged that the Administrative Law Judge exceeded his or her jurisdiction in granting or denying the relief requested at preliminary hearing. See K.S.A. 44-551.

Issues dealing with the medical care ordered at preliminary hearing are not appealable from a preliminary hearing order as the Administrative Law Judge is granted specific authority to provide medical care under K.S.A. 44-534a, as amended. As such the issues raised by claimant will not be considered at this time.

The issue of whether claimant suffered accidental injury arising out of and in the course of his employment with respondent is considered jurisdictional under K.S.A. 44-534a, as amended, and can be considered by the Appeals Board on appeal from a preliminary hearing.

Claimant alleges two separate accidental injuries, one in June 1997 and one on August 21, 1997. Respondent contends neither accidental injury occurred for several reasons. The Appeals Board will consider the accidental injury dates separately.

On June 20, 1997, claimant completed a new patient information form with the Wilbeck Clinic in Wichita, Kansas. This information form indicated that claimant was suffering from low-back pain and had been having difficulties on and off for four years. Information on the form indicated that the problem was made worse by sitting and slouching. When claimant was asked if he had any accidents or falls he indicated only a car wreck in 1993. The form asked if claimant had a workers compensation injury and claimant denied same. When asked which insurance company was going to pay for this

treatment claimant advised that he had a coupon for one free visit and otherwise had no insurance.

A form prepared for the Wilbeck Clinic on June 26, 1997, again denied any workers compensation claim and indicated that claimant had no insurance. Respondent presented the testimony of Mr. Ron King, manager of LSI Temporaries, the firm which employed claimant and Mr. Jeff Benbrook, an employee of the company which subcontracted claimant's services through LSI. Both men admitted to having conversations with claimant regarding his ongoing back problems in June 1997. Both denied receiving any information from claimant that he had in any way suffered a work-related injury while employed in June 1997. Claimant also provided information to the Saint Joseph Medical Center emergency room on June 23, 1997, indicating that he had not suffered any trauma or injury leading up to his current back problems.

In Workers Compensation litigation it is claimant's burden to prove by a preponderance of the credible evidence his entitlement to the benefits claimed. See K.S.A. 44-501 and K.S.A. 44-508(g), as amended. The Appeals Board finds, based upon the above evidence, that claimant has failed to prove accidental injury arising out of and in the course of his employment in June 1997.

The Appeals Board will next consider the claimant's allegation that he suffered injury on August 21, 1997.

Claimant received treatment with Dr. Jay Lemon through July 3, 1997. He was also provided treatment with Dr. M. Dugans at the Wichita Primary Care Center in June 1997, and with Dr. R. L. Wilson and Dr. J. F. Burpee. On July 10, 1997, claimant was dismissed to return home and apparently sought no additional care until approximately August 28, 1997. Claimant alleges that on August 21, 1997, while picking up a large dock plate, he suffered additional injury to his back. The testimony of Mr. King and Mr. Benbrook are clear with regard to conversations with claimant in June 1997. However, their testimony is less clear with regard to the August 1997 injury regarding whether any conversations took place.

Several documents created on August 28, 1997, with Via Christi indicate that claimant injured himself on August 21, 1997, while handling the dock plate. Claimant described this plate as a 4x8 piece of metal one inch thick weighing between 200 and 400 pounds. The testimony of other witnesses indicated the plate may have weighed as little as 70 to 80 pounds. Regardless of which description is accepted, lifting a 4x8 sheet of metal one inch thick would place stress on an individual's low back, especially if one had a preexisting back problem as was the case with claimant. While there is some contradictory evidence regarding what may or may not have occurred on August 21, 1997, the preponderance of the evidence seems to indicate that claimant did suffer an accident while working for respondent on that date which resulted in injury to his low back. The Appeals Board finds, based upon the evidence in the record, that claimant has proven

accidental injury arising out of and in the course of his employment on August 21, 1997, and the Order of Administrative Law Judge Barnes is affirmed with regard to that accident date.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 16, 1997, should be, and is hereby, affirmed in part and reversed in part in that claimant is entitled to medical treatment for an injury suffered on August 21, 1997, arising out of and in the course of his employment with respondent. The Order of the Administrative Law Judge regarding claimant's entitlement to medical treatment, the payment of unauthorized and authorized medical expenses, and temporary total disability compensation remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Douglas D. Johnson, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director